

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
)
1998 Biennial Regulatory Review -)
Petition for Section 11 Biennial Review)
filed by SBC Communications, Inc.)
Southwestern Bell Telephone Company,)
Pacific Bell, and Nevada Bell)
_____)

CC Docket No. 98-177

**OPPOSITION OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to *Notice of Proposed Rulemaking*, DA 98-238 (released November 24, 1998), hereby opposes the regulatory relief sought by SBC Communications, Inc. ("SBC"), Southwestern Bell Telephone Company ("Southwestern Bell"), Pacific Bell and Nevada Bell (collectively, "Petitioners") in their Petition for Section 11 Biennial Review ("Petition") filed in the captioned docket on May 8, 1998. Specifically, TRA opposes herein proposals by Petitioners to (i) detariff for all carriers special access services, direct trunked transport, operator services, directory assistance and interexchange services, and (ii) relax the Commission's affiliate transaction rules.

¹ A national trade association, TRA represents nearly 800 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers.

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As the Commission notes, the bulk of the regulatory categories identified by Petitioners are already the subject of proceedings that have been or will be initiated as part of the Commission's statutorily-mandated biennial regulatory review. More than three months before Petitioners filed their Petition, the Commission staff released a list of 31 proceedings it recommended that the Commission initiate in furtherance of the directive of Section 11 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, to "review all regulations issued under this Act in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service[,] . . . determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service[,] . . . [and] repeal or modify any regulation it determines to be no longer necessary in the public interest."² Given the comprehensiveness of this list of proposed rulemaking and notice of inquiry proceedings, more than two-thirds of which involved common carrier matters, precious few of Petitioners' proposals require additional comment here, and none demand serious consideration.

Initially, Petitioners, like seemingly every other incumbent local exchange carrier ("LEC"), engage in serious overstatement in claiming that "[m]eaningful economic competition is underway" and that accordingly, "[r]egulations which are holdovers from a monopoly local exchange market must be relaxed or eliminated in light of these developments."³ To the contrary, the most recent report on the state of local competition issued by the Industry Analysis Division of the

² 47 U.S.C. § 161; Pub. L. No. 104-104, 110 Stat. 56, § 402 (1996).

³ Petition at 8.

Common Carrier Bureau ("Local Competition Report") confirms that competitive inroads into the local exchange/exchange access markets remain minimal.⁴

As of mid-year 1998, only "about 1.5% of nationwide ILEC switched voice grade lines were used by CLECs to resell ILEC services to CLEC customers," and "resold ILEC lines outnumbered UNE loops by a factor of approximately 10 to 1."⁵ Confirming that the preponderance of local competition is provided over resold lines, local telephone numbers ported by competitive LECs represent a small fraction of a single percent of total access lines nationwide.⁶ Moreover, even resale competition remains spotty, with roughly a quarter of the states evidencing 0.5 percent or less of switched voice grade lines being used by competitive LECs to resell local services, and an additional half dozen or so states showing less than one percent of such lines being so used.⁷ Indeed, as the Local Competition Report notes, "5 ILEC operations located in 5 states" reported "0% of ILEC voice grade switched lines" used by competitive LECs to provide resold local services.⁸

In arguing for detariffing, however, Petitioners zero in on selected services which they claim are "highly competitive."⁹ Of course, data are supplied for only one of these services –

⁴ Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Local Competition (December, 1998) ("Local Competition Report").

⁵ Id. at 17 - 18. SBC claims to have lost "830,000 access lines . . . to CLECs through resale or through the establishment of new facilities-based service by CLECs in SBC's seven state areas." Petition at 7. This figure represents less than two percent of total access lines in this seven state area. Federal Communications Commission, Preliminary Statistics of Communications Common Carriers, pages 24 - 25, table 2.5 (1997 edition).

⁶ *See generally* local competition survey responses submitted by individual BOCs, GTE and other large incumbent LECs in Third Quarter 1998.

⁷ Local Competition Report at Table 3.1.

⁸ Id. at 17.

⁹ Petition at 21.

i.e., special access – and these "statistics" are of questionable value. Thus, Petitioners claim to have lost 38 to 49 percent of the high capacity special access market in selected "major markets."¹⁰ It is unclear, however, whether the percentage figures proffered by Petitioners represent revenues or highly manipulatable "DS-1 equivalents," or whether the values include "retail" offerings which are inflated by Petitioners underlying provision of wholesale services. Also absent from Petitioners' "analysis" is any assessment of the percentage of high capacity locations served by a competitive provider of high capacity services and hence the percentage of potential high capacity customers which have a meaningful choice of high capacity service suppliers. Moreover, there is little data pertaining to other incumbent LECs and other markets. In short, Petitioners' "competitive analysis" is at best meaningless and potentially, highly misleading.¹¹

The Commission has endorsed detariffing only in circumstances in which carriers lack market power. Thus, in adopting "permissive detariffing for provision of interstate exchange access services by providers other than incumbent local exchange carriers," the Commission repeatedly emphasized that "CAPs are nondominant, and . . . nondominant carriers, 'by definition,' cannot exercise market power," and that "competitive LECs do not appear to possess market power," being possessed of "an extremely small share of the interstate access market."¹² Likewise, in

¹⁰ Id. at 22.

¹¹ As the Commission emphasized in another context, "[w]hile we are required under Section 10 to grant petitions for forbearance when we are able to make the requisite statutory findings, petitioners must support such requests with more than broad, unsupported allegations in order for us to exercise that statutory authority." Hyperion Telecommunications, Inc. Petition Requesting Forbearance (Memorandum Opinion and Order), 12 FCC Rcd. 8596, ¶ 21 (1997).

¹² Id. at ¶¶ 23 - 24.

relieving nondominant interexchange carriers of their statutory obligation to file tariffs, the Commission stressed again and again that such carriers "lack market power."¹³

As noted above, incumbent LECs retain market power in the exchange access market, precluding any finding that current requirements that rates and charges for interstate exchange access be tariffed are "no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." As succinctly described by Sprint Corporation ("Sprint") in comments recently submitted in the Commission's access charge reform rulemaking proceeding:

[C]ompetitive LECs account for only 0.4% of the minute-of-use-based access charges that Sprint pays. Overall, including both switched and special access, the ILECs' competitors received only 2.4 cents of every access dollar spent by Sprint in January 1998, up only marginally from two cents in 1996. And in the New York City LATA 1321 -- perhaps the most "competitive" LATA in the U.S., and one where Spring uses an alternative vendor as its carrier of choice -- Bell Atlantic continued to receive 86 cents of every Sprint access dollar.¹⁴

This assessment was echoed by MCI WorldCom, Inc. ("MCI WorldCom"):

MCI WorldCom is the second largest interexchange carrier and CLEC with greatest reach and most facilities. Yet MCI WorldCom has so far been able to migrate only a tiny fraction of its traffic off of the monopolists' access networks. . . . [I]n the decade since the Commission introduced competition for transport services, transport competition is only beginning to develop for certain routes. . . . MCI WorldCom has been marginally successful in finding and implementing alternatives for DS3 Entrance Facilities in the limited

¹³ Policy and Rules Concerning the Interstate, Interexchange Marketplace (Second Report and Order), 11 FCC Rcd. 20730, ¶¶ 21, 36, *recon.* 12 FCC Rcd. 15014 (1997), *pet. for review pending sub nom. MCI Telecommunications Corp. v. FCC*, Case No. 96-1459 (D.C. Cir. Feb. 13, 1997), *stayed pending judicial review*.

¹⁴ Comments submitted by Sprint Corporation in CC Docket No. 96-262 on October 26, 1998 at 4 - 5.

locations served by CAPs. However, we have been far less successful in finding alternatives for interoffice transport and tail circuits, and we continue to use ILEC multiplexing almost 100 percent of the time. . . .

During the first six months of 1998, an average of only 3 percent of MCI's total billed access charges, and far less than one percent of MCI's switched access minutes are with competitive access providers ("CAPs") or competitive local exchange carriers ("CLECs").¹⁵

The Commission has recognized that tariffing by carriers that retain market power is necessary to ensure that rates and charges are "just and reasonable and not unjustly or unreasonably discriminatory" and "to protect . . . customers."¹⁶ Because market forces sufficient to restrain incumbent LEC market conduct have not yet emerged (and are unlikely to emerge in the foreseeable future), extending detariffing to such providers cannot be said to be "consistent with the public interest."¹⁷ Indeed, it was the incumbent LECs "whose rates . . . [remained] subject to regulation," to which the Commission looked to restrain any abuses that in setting terminating access charges by carriers that possess "an extremely small share of the interstate access market."¹⁸

Like concerns argue against any relaxation of the Commission's affiliate transaction rules. The Commission's accounting safeguards, "consist[ing] of cost allocation and affiliate transaction rules," were "designed to keep incumbent local exchange carriers from imposing the costs and risks of their competitive ventures on interstate ratepayers, and to ensure that interstate

¹⁵ Comments submitted by MCI WorldCom, Inc. in CC Docket No. 96-262 on October 26, 1998 at iii, 18 - 19, Appx. B.

¹⁶ Hyperion Telecommunications, Inc. Petition Requesting Forbearance (Memorandum Opinion and Order), 12 FCC Rcd. 8596 at ¶¶ 21, 26, 27.

¹⁷ Id. at ¶ 24.

¹⁸ Id.

ratepayers share in the economies of scope realized by incumbent local exchange carriers when they expand into additional enterprises."¹⁹ As the Commission has recognized, incumbent LECs retain "the ability and incentive to misallocate costs from their in-region, interstate, interexchange services to their monopoly local exchange and exchange access services within their local service region, " resulting in "substantial harm to consumers, competition, and production efficiency."²⁰ An incumbent LEC can also "use its market power in the provision of exchange access service to advantage its interexchange affiliate by discriminating against the affiliate's interexchange competitors with respect to the provision of exchange and exchange access services."²¹ Finally, "absent appropriate regulation," an incumbent LEC "could potentially initiate a price squeeze to gain additional market share . . . [by] rais[ing] the price of access . . . [and] set[ting] its in-region, interexchange prices at or below its access prices."²²

The Commission's affiliate transaction rules, in conjunction with other agency accounting safeguards, help to protect against such abuses. As articulated by the Commission, "[w]e believe that the Commission's access charge rules, imputation requirements, and cost allocation and

¹⁹ Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996 (Report and Order), 11 FCC Rcd. 17539, ¶ 25 (1996), *recon pending* ("Accounting Safeguards Order").

²⁰ Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area (Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61), 12 FCC Rcd. 15756, ¶ 159 (1997). As the Commission has recognized, such cost misallocations "are not necessarily deterred by price cap regulation." *Id.* After all, productivity factors must be periodically revisited.

²¹ *Id.* at ¶ 160 (in "the form of poorer quality interconnection or unnecessary delays in satisfying a competitor's request to connect to the . . . [incumbent LEC's] network").

²² *Id.* at ¶ 161.

affiliate transaction rules continue to serve important purposes."²³ Thus, the Commission, "in order to protect against the subsidies prohibited by section 254(k)," applied its affiliate transaction rules "to all transactions between incumbent local exchange carriers and their affiliates providing any of the competitive services of the types permitted under sections 260 and 271 through 276."²⁴ As the Commission explained:

Our existing affiliate transactions rules do not protect against subsidies from an incumbent local exchange carrier's exchange services and exchange access flowing to its affiliate providing regulated telecommunications services, such as in-region services, out-of-region services, or certain types of incidental services. Our affiliate transaction rules, however, are necessary to ensure that cross-subsidization of these services is prevented as required by sections 271(h) and 254(k). Earlier we concluded that interLATA telecommunications services, including in-region services, out-of-region services and certain types of incidental services, should be treated by the BOCs like nonregulated activities for federal accounting purposes. This treatment will prevent cross-subsidization by triggering the application of our affiliate transaction rules. Accordingly, we conclude that interLATA telecommunications services should be treated like nonregulated activities for federal accounting purposes whenever these services are provided by any incumbent local exchange carrier through an affiliate.²⁵

While it has been roughly two years since the Commission so declared, little has changed with respect to the status of local competition during that period. When the Commission released its *Accounting Safeguards Order*, "BOCs . . . [were] the dominant providers of local exchange and exchange access services in their in-region states, accounting for approximately 99.1

²³ Id. at ¶ 169 (emphasis added).

²⁴ Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996 (Report and Order), 11 FCC Rcd. 17539 at ¶ 256.

²⁵ Id. at ¶ 257.

percent of the local services revenues in those markets."²⁶ As discussed earlier, incumbent LECs retain market shares in the high ninetieth percentile today. In short the importance of the Commission's affiliate transaction rules, as well as all of the agency's other accounting and non-accounting safeguards, has not diminished in the least.

If Petitioners desire relaxation of the Commission's accounting/non-accounting safeguards and tariffing requirements, they should cease their ongoing efforts to hinder local exchange/exchange access competition and do that which they are required by law to do -- *i.e.* open their markets fully to competition. The regulatory relaxation sought by Petitioners is premature absent the emergence of dynamic local exchange/exchange access competition.

²⁶ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905, ¶ 10 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *pet. for rev. pending sub nom. SBC Communications Corp. v. FCC*, Case No. 97-1118 (D.C. Cir. Mar. 6, 1997), *remanded in part sub nom. Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand FCC 97-222* (released June 24, 1997), *aff'd sub nom Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997) ("Non-Accounting Safeguards Order").

By reason of the foregoing, the Telecommunications Resellers Association strongly urges the Commission to summarily deny the regulatory relief sought by Petitioners, including Petitioners' proposals to (i) detariff for all carriers special access services, direct trunked transport, operator services, directory assistance and interexchange services, and (ii) relax the Commission's affiliate transaction rules.

Respectfully submitted,

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